

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Natividad Silva,

File No. 18-cv-2177 (ECT/ECW)

Petitioner,

v.

**ORDER ACCEPTING REPORT
AND RECOMMENDATION**

David Paul, Warden,

Respondent.

Petitioner Natividad Silva (“Silva”) commenced this action pro se by filing a petition for a writ of habeas corpus. ECF No. 1. He subsequently filed a motion for a temporary restraining order. ECF No. 17. The case is before the Court on a Report and Recommendation [ECF No. 28] issued by Magistrate Judge Elizabeth Cowan Wright. Magistrate Judge Wright recommends denying both Silva’s petition and his motion for a temporary restraining order, in part because his claims relating to the Administrative Procedure Act, the conditions of his confinement, and alleged retaliation are not appropriately brought as a habeas petition under 28 U.S.C. § 2241 and must instead be brought, if at all, as a constitutional claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). R&R at 15–16, 17–18. Magistrate Judge Wright observed that, rather than automatically converting the petition into a *Bivens* action, Silva should be given the opportunity to affirmatively consent to having his claims adjudicated in that manner. R&R at 16; *see also Spencer v. Haynes*, 774 F.3d 467, 471 (8th Cir. 2014). She further observed that, because Silva already has three strikes under

28 U.S.C. § 1915(g), he would not be permitted to proceed *in forma pauperis* and would have to pay the full filing fee. R&R at 16.

Silva filed objections to the Report and Recommendation. Obj. [ECF No. 29]. In addition to his objections to the substance of the Report and Recommendation, Silva specifically disclaims any desire to pursue a *Bivens* action. *See* Obj. at 3 (“Silva brings his ‘OBJECTIONS’ to the Magistrate’s ‘Report and Recommendation’ objecting that he is not seeking any Bivens in order to sue”); *id.* at 7 (“[T]his writ does not seek any civil action”). In response to Silva’s objections, Respondent filed a short response confirming Respondent’s view that the Report and Recommendation “should be adopted in its entirety.” ECF No. 34.

Because Silva has objected, the Court is required to review the Report and Recommendation de novo pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.2(b)(3). The Court has undertaken that de novo review and has concluded that Magistrate Judge Wright’s analysis and conclusions are correct. Notwithstanding Silva’s repeated disavowal of any intention to pursue a *Bivens* action, the Court will nevertheless provide him a final opportunity to do so, provided he pays the full filing fee remaining.

Therefore, based upon all of the files, records, and proceedings in the above-captioned matter, **IT IS HEREBY ORDERED** that:

1. The Objections to the Report and Recommendation are **OVERRULED** [ECF No. 29];
2. The Report and Recommendation [ECF No. 28] is **ACCEPTED** in full;
3. Petitioner’s petition for a writ of habeas corpus [ECF No. 1] is **DENIED**;

4. Petitioner's Motion for a Temporary Restraining Order and Preliminary Injunction and Request for Emergency Hearing [ECF No. 17] is **DENIED**;
5. It is **ORDERED** that, if Petitioner wishes to convert his petition into a *Bivens* action, he must file a notice to that effect on or before Friday, February 25, 2019. Any such notice must be accompanied by the full filing fee, less the \$5.00 Petitioner has already paid. Failure to file such a notice, or to pay the remaining filing fee in full, will result in the dismissal of this action.

Dated: February 11, 2019

s/ Eric C. Tostrud

Eric C. Tostrud

United States District Court